IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1732

LAWRENCE E. BOWLING,
Petitioner,

v.

DAVID MATHEWS ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE

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October Term, 1978

No.78-1782

LAWRENCE E. BOWLING,
Petitioner,
v.

DAVID MATHEWS et al.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

In their brief in opposition, respondents other than C. Dallas Sands argue that this case is controlled by Board of Regents v. Roth (1972), 408 U.S. 564; Perry v. Sindermann (1972), 408 U.S. 593; Arnett v. Kennedy (1974), 416 U.S. 134; Bishop v. Wood (1976), 426 U.S. 341; and Mt. Healthy v. Doyle (1977), 429 U.S. 274.

But each of those cases is distinguished from the instant case in one most important respect: None of the nonretained employees in those cases based any claim upon § 1983, § 1985, or § 1986 of the Civil Rights Acts. Federal employee Kennedy charged denial of

due process under the Fifth Amendment; and the four state employees charged denial of due process under the Fourteenth Amendment. None of the state employees was conceded to have had tenure. Roth and Doyle admittedly had no tenure; Bishop was found by the Court to have had no property interest protected by the Fourteenth Amendment; and Sindermann had yet to show that he had such an interest.

In the instant case, respondents admit (p.12) that petitioner had tenure. Moreover, petitioner's Complaint and his Amendment to Complaint charged respondents with depriving him of rights protected not only by the Fourteenth Amendment but also by §§ 1983, 1985, and 1986 of the Civil Rights Acts (M2, M155; Pet.3-8), which significantly enlarge the Due Process Clause of the Fourteenth Amendment.

Despite their differences from the present case, each of the referenced cases affirms one or more basic legal principles with which the decision below is in conflict.

RIGHT TO FEDERAL FORUM AND JURY TRIAL

Respondents argue that petitioner is not entitled to "a plenary trial and by a jury" in a federal forum (p.13). Such argument conflicts with the express intent of Congress in its enactment of the Civil Rights Acts and 28 U.S.C. § 1343. It also conflicts with the decisions of the Court, which has consistently held that "the filing of a complaint pursuant to § 1983 in federal court initiates an original plenary civil action, governed by the full panoply of the Federal Rules of Civil Procedure." Preiser v. Rodriguez (1973), 411 U.S. 457,496.

In the past five years, the Court has twice reversed the Fifth Circuit on the issue of a plaintiff's right to a federal forum in an action filed under § 1983. Ellis v. Dyson (1975), 421 U.S. 426; Steffel v. Thompson (1974), 415 U.S. 452.

Even apart from his claims under §§ 1983, 1985, and 1986, petitioner was entitled to trial in a federal forum and by a jury, under the Due Process Clause of the Fourteenth Amendment. In support of their argument to the contrary, respondents cite Hortonville Joint School District v. Hortonville Education Association (1976), 426 U.S. 482. But their reliance on that case is misplaced. In Hortonville, the Court held that "the Due Process Clause of the Fourteenth Amendment did not guarantee [the striking teachers] that the decision to terminate their employment would be made or reviewed by a body other than the School Board." Id. 497. However, the Court reached this conclusion only because of the following findings: (1) "that state law prohibited the strike and that termination of the striking teachers' employment was within the Board's statutory authority" (Id. 488); (2) "that the Board members had [no] kind of personal or financial stake in the decision that might create a conflict of interest" (Id. 491-492); and (3) that, "[s]ince the teachers admitted that they were in a work stoppage, there was no possibility of an erroneous factual determination on this critical threshold issue" (Id. 494).

Hortonville is thus clearly distinguished from the instant case, in which the final decision to discharge was made by school board members (1) who made independent findings of disputed facts, (2) who decided whether those findings justified discharge,

(3) who formulated and applied a set of ex post facto standards on which they based their decision to discharge, and (4) who had a "financial stake in the decision" sufficient to "create a conflict of interest" because they were defendants in the legal action in the same case. Gibson v. Berryhill (1973), 411 U.S. 564, 579. The Board members refused to testify before the Committee because they were defendants; and Dr. Gundy, who made the final administrative decision to discharge, had previously disqualified himself for the same reason. Pet. 20-21; 2T 1277:8-18, 1541:16-20.

IMPROPRIETY OF SUMMARY JUDGMENT

Respondents argue (pp.5-8) that the District Court properly granted, and the Court of Appeals properly affirmed, summary judgment for respondents, on the basis of the Second Hearing record. But they cite no law supporting this argument. Instead, they simply urge the Court to accept their version of the facts, contrary to F.R.C.P. 56(c) and consistent rulings of the Court. In Bishop, Arnett, and Sindermann, the Court reaffirmed the principle that, on a motion for summary judgment, the standard to be applied by both the trial court and the reviewing court is that the party who defended against the motion will have the advantage of the court's reading the record in the light most favorable to him, will have his allegations taken as true, and will receive the benefit of the doubt when his assertions conflict with those of the movant. Bishop, 426 U.S. at 347; Arnett, 416 U.S. at 139-140; Sindermann, 408 U.S. at 599; Wright and Miller, Federal Practice and Procedure § 2716, pp. 430-432, and cases therein cited.

In Sindermann, the Court held that the District Court improperly granted summary judgment for the school officials when there were genuine disputes as to material facts. Professor Sindermann charged that his employment was terminated without a hearing and because of his criticism of school officials. He alleged de facto tenure and the right to a hearing. Members of the Board and the President denied that their decision was made in retaliation for Professor Sindermann's criticism and argued that they had no obligation to provide a hearing. Without allowing trial on these disputed issues, the District Court accepted defendants' version of the facts and granted their motion for summary judgment. The Court of Appeals reversed and remanded for trial on these disputed issues. This court held that Sindermann was entitled to trial on the merits of both his allegation of tenure and his charge of retaliation for exercise of protected speech.

In the instant case, the District Court granted summary judgment on the basis of a school hearing record containing innumerable genuine disputes as to material facts, and respondents now argue that their version of the facts should be taken as true. The most serious of their allegations is that there were "[a]dmitted refusals by petitioner to accept duly made class assignments" (p.6). But they cite no specific instance and no page reference supporting this allegation; and the record contains no admission by petitioner that he ever refused to accept any duly made teaching assignment.

The crucial instance of "refusal" alleged in the Statement of Charges related to January 11, 1972. Dean Jones, who filed those

charges testified that petitioner's alleged "refusal" to teach a section of English 9 on January 11, 1972, was the decisive element in his decision to file the dismissal charges. 2T 967:14-18. On closer examination, however, Dean Jones admitted that petitioner did not refuse to teach the class but only objected and stated the grounds for his objection:

> A [by Dean Jones]. Dr. Bowling said if I told him to teach the course, he would teach it; he was not refusing to teach the course. ... I would not order him specifically to teach English Nine. ... Dr. Bowling told me ... that he had not taught the course, he was not prepared to teach it, did not want to teach it. [1T 201:16--202:4; RX 70; emphasis added]

> A [by Dean Jones]. He did state, "If you order me to teach the course I will do the best that I can with it." ... He then brought up the matter of the contract violations, that he was not brought here to teach lower level courses. [2T 912:13-15]

> Q. But to repeat, you didn't tell him at that time that the request which had been made to him was tantamount to an order, equaled an order, was an order, you did not use those words, or words to that effect?
> A [by Dean Jones]. I don't recall doing that. [2T 916:16-21; emphasis added]

This testimony by respondents' own witness, who also brought the charges, makes clear that petitioner did not "refuse" to teach the course, that he did not disobey any order, and that all he did was to object to a "request" and to state both his reasons

for objecting and his willingness to teach the course if "told" to do so.

DEPRIVATION OF FIRST AMENDMENT RIGHTS

In the first sentence of their argument relative to "freedom of speech" (p.9), respondents assert: "No First Amendment issue is present in this case." That a First Amendment issue is not only present in this case but is actually the crucial issue in the case is confirmed by the foregoing quoted testimony by Dean Jones, who brought the dismissal charges and who further testified as follows:

> Q. If Dr. Bowling had agreed to teach English 9 on January 11, 1972 when originally assigned would these charges have been brought?
> A [by Dean Jones]. No. [2T967:14-18]

This testimony by Dean Jones, along with that quoted on p. 6, clearly reveals that the discharge proceedings were brought against petitioner because of his exercise of two First Amendment rights: his right to freedom of speech and his right to petition his government for redress of grievances. This court has never held that an employee may be discharged for discussing with his employer the terms and conditions of his employment. Only this term, the Court reaffirmed its consistent holdings that such speech is protected by the First Amendment. Givhan v. Western Line Consolidated School District (1979), 99 S.Ct. 693. Without such protection, there could be no labor unions or labor arbitration.

UNCONSTITUTIONALITY OF "ADEQUATE CAUSE"

Respondents argue that undefined and unrestricted "adequate cause" is not unconstitutionally vague or overbroad as a standard for discharge (p.10), and they cite Arnett. But Arnett refutes their argument.

In Arnett, the alleged regulation was 5 U.S.C. § 7501(a), which provided: "An individual in the competetive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service." 416 U.S. at 140. A three-judge District Court held this regulation unconstitutionally vague and overbroad. On appeal to this court, a plurality of three justices held the regulation not unconstitutional, because of the following considerations: (1) "Congress sought to lay down an admittedly general standard ... in order to give myriad different federal employees performing widely disparate tasks a common standard of job protection" (Id. at 159); (2) "'such cause as will promote the efficiency of the service' was not written on a clean slate in 1912, and it does not appear upon a clean slate now" (Id. at 160); (3) "Moreover, OEO has provided by regulation that its Office of General Counsel is available to counsel employees who seek advice on the interpretation of the Act and its regulations" (Id. at 160); (4) Congress "obviously did not intend to authorize discharge under the Act's removal standard for speech which is constitutionally protected" (Id. at 162); (5) "the Court has a duty to construe a federal statute to avoid a constitutional question where such a construction is reasonably possible" (Id. at 162); and (6)"We hold that the language 'such cause as will promote the efficiency of the service' in

the Act excludes protected speech and that the statute is therefore not overbroad." Id. at 162.

Two justices concurred with the plurality on the issues of vagueness and overbreadth, without stating why; and one justice concurred, on the ground that "[t]he regulations of the Civil Service Commission and the Office of Economic Opportunity [OEO], at which appellee was employed, give content to 'cause' by specifying grounds for removal". Id. at 172; emphasis added.

No justice expressed the view that "such cause as will promote the efficiency of the service", apart from the foregoing qualifications and restrictions, could be constitutionally valid. Indeed, even with these qualifications and restrictions, the regulation was unacceptable to three justices, who expressed the view that they "would affirm the judgment of the District Court ... in its decision that 5 U.S.C. § 7501 is unonstitutionally vague and overbroad as a regulation of employee's speech." Id.at 206.

No limiting or clarifying factor stated by any of the justices upholding the constitutionality of the statute is present in the instant case: (1) the University of Alabama's regulation that "the appointment of a faculty member who has tenure ... may be terminated for adequate cause" may not be justified on the ground that it applies to a "myriad of [state] employees performing widely disparate tasks"; for, in fact, it applies to only a few hundred employees, all of whom are teachers, performing basically similar tasks and possessing basically similar rights; (2) the phrase "adequate cause" was adopted from the American Association of University Professors' "Academic

Freedom and Tenure, 1940 Statement of Principles"; and that professional organization has long ago and repeatedly put the University on notice that "adequate cause", without clarification and restriction, is vague and overbroad:

> One persistent source of difficulty is the definition of adequate cause for the dismissal of a faculty member. Despite the 1940 Statement of Principles on Academic Freedom and Tenure and subsequent attempts to build upon it, considerable ambiguity and misunderstanding persist throughout higher education, especially in the respective conceptions of governing boards, administrative officers, and faculties concerning this matter. The present statement assumes that individual institutions will have formulated their own definitions of adequate cause for dismissal, bearing in mind the 1940 Statement and standards which have developed in the experience of academic institutions.

"Statement on Procedural Standards in Faculty Dismissal Proceedings", originally adopted in 1958 by the Association of American Colleges and the American Association of University Professors and frequently reprinted, including the AAUP Bulletin, Vol.54, No.4, Winter, 1968, pp. 439-441; AAUP Policy Documents and Reports, 1969, 1970, 1971, 1972, 1973 et seq., p.5; (3) as used by the University of Alabama, "adequate cause" appears on a "clean slate", for the University has never defined or restricted the term, as the AAUP advised; and it has never provided any counseling service comparable to that provided by OEO's Office of General Counsel, for informing teachers of the official interpretation of this regulation; (4) the University has not only failed to show that

"adequate cause" excludes protected speech but, in the instant case, has actually construed the phrase to include a teacher's discussions with his employer concerning the terms and conditions of his employment; (5) a federal court has no jurisdiction to construe a state statute or regulation (as it does a federal statute) to avoid a constitutional challenge (Arnett, supra, at 162; Note, Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts, 26 Stanford Law Rev. 855, 871-872; (7) therefore, "adequate cause" must be declared unconstitutional on its face. Id. at 860-863.

RIGHT TO REINSTATEMENT IN 1974

Respondents concede that "petitioner had a 'property interest' protected by the Fourteenth Amendment in his teaching position under state law as a result of the tenure provisions in his contract with the University, Roth, 408 U.S. 569-71, and thus was entitled to procedural due process before being discharged" (p.12). They also acknowledge that "the District Court determined in 1974 that the first notice and academic hearing afforded petitioner did not comport with procedural due process standards"(p.16). But they argue that the deprivation of his position without due process did not entitle petitioner to reinstatement, even temporarily, but would only "oblidge college officials to grant a [second] hearing at his request." Sindermann, supra, at 603. But these cases clearly refute their argument.

In Roth, the Court reaffirmed its prior holdings that, "[b]efore a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing" complying with due process and that "[w]hen a

State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards." Roth, 480 U.S. at 570, n.7, and 575, n.14. In the instant case, petitioner was first removed from the classroom, in the middle of the semester and without any notice, charges, or hearing. He was later discharged following a hearing which the District Court found to have denied due process, and respondents have never challenged this finding. Petitioner's removal from his classroom forum without due process constituted an even more grave prior restraint than the seizure of allegedly obscene books in the cases referenced in Roth. Moreover, if a person must be afforded due process of law before he may be deprived of a constitutional right, it is obvious that a court may not continue to deprive a person of a constitutional right after determining that the original deprivation was unconstitutional. The Court has held that "legal discretion ... does not extend to a refusal to apply well-settled principles of law to a conceded state of facts." Union Tool Co. v. Wilson (1922), 259 U.S. 197, 112. Once the District Court determined that petitioner had been removed from his position and his classroom forum without due process, it had no discretion to deny his full and immediate reinstatement.

In Sindermann, a professor alleging tenure was discharged without a hearing, and the trial court granted summary judgment against him. The Court held that Professor Sindermann "must be given an opportunity to prove the legitimacy of his claim. ... Proof of such a property interest would

not, of course, entitle him to [permanent] reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603. The Court did not order Sindermann's preliminary reinstatement pending the referenced hearing, for he had yet to show that he had a protected property interest. But the Court did imply that, if Sindermann could show (1) that he had tenure and (2) that he had been deprived of his position without due process, he would then be entitled to reinstatement: he would not be required to await a possible second hearing, to see whether the school officials could discharge him legally.

In the instant case, at the time the District Court remanded this cause to the University for a second discharge hearing, petitioner had already proved everything that this court held that Sindermann had yet to prove in order to obtain reinstatement: First, the fact of petitioner's tenure had never been disputed; second, the Court had already found that petitioner had been deprived of his tenured position without due process. Therefore, at that point, petitioner was entitled to full and immediate reinstatement; and the District Court had no discretion either (a) to continue the unconstitutional deprivation or (b) to order another hearing. The District Court was constitutionally bound to order the full and immediate restoration of petitioner to all the rights he had enjoyed prior to the unconstitutional deprivation and to leave to repondents the decision whether to begin again with a completely new proceeding. This is the ruling mandated by this court's holdings in Vitarelli v. Seaton (1950), 359 U.S. 535, and Armstrong v. Manzo (1965), 380 U.S. 545.

CONFLICT WITH THE ALABAMA SUPREME COURT

Respondents argue that there is no conflict between the decision below and the ruling of the Alabama Supreme Court on the issue of due process in State Tenure Commission v. Madison County Board of Education, 282 Ala. 658, 213 So.2d 823 (1968). "Madison County," they argue, "is distinguishable by the existence of a state statutory procedure in that case governing the discharge of tenured teachers ..."(p.20).

Contrary to respondents' argument, the Alabama Supreme Court did not rely on any Alabama statute for its ruling that certain specifications against the teacher were "glaringly defective and not due proces" because "after these dates complained of, the teacher was an approved teacher in the school and served subsequent terms. Such alleged violations, even if proven, were condoned and waived for all periods other than the last school year served by the teacher." 213 So.2d at 829.

That the authority relied on for this ruling was the United States Constitution and not merely a state statute applicable only to Alabama "boards" and "courts" is made clear by the following facts. First, the Court stated its view of "due process" as a universal principle: "Due process must be observed by all boards, as well as courts. Due process, in more ordinary language, is held to mean 'fair play,' as stated by the court in State ex rel. Steele v. Board of Education of Fairfield, 252 Ala. 254, 40 So.2d 689." Id. at 834. Second, the reference to Steele is to the following holding: "While no particular form of procedure is prescribed for such hearings, due process must be observed. Such is the rule generally

as to hearings provided for by statute before administrative agencies. Morgan v. United States, 304 U.S 1 ...; Interstate Commerce Commission v. Louisville & Nashville R.R.Co., 227 U.S. 88 ...." It is thus clear that the Alabama Supreme Court was relying on the U. S. Constitution and not on any Alabama law when it declared that all charges relating to "periods other than the last school year served by the teacher before the written complaint against him" are "glaringly defective and not due process." 213 So.2d at 829.

In the instant case, almost all of the specifications on which both the Committee and the Board based their findings pertained to periods ranging from one to seven years prior to the "last school year served by [petitioner] before the written complaint against him"; and this was not due process.

DISMISSAL AS TO C. DALLAS SANDS

In his brief in opposition, respondent C. Dallas Sands makes three basic errors. First, he ignores the charge of conspiracy and the facts pertaining thereto. Second, he ignores the Court's construction of F.R.C.P. 12(b)(6). Third, he insists that his version of the facts should be taken as true on his motion to dismiss.

The Complaint and the Amended Complaint charged that Sands and other respondents conspired to, and did, deprive petitioner of rights protected by the Constitution. Specifically, petitioner alleged that Sands was a long-time personal friend of English Chairman James B. McMillan, whose political solicitation of petitioner during the Presidential campaign of 1964 created an unhealthful atmosphere ultimately resulting in the discharge of petitioner; that Sands supported McMillan in that solicitation; that, on January 12, 1972, Sands advised Dean Jones in the matter of bringing dismissal charges against petitioner; that, on the following day, Jones took a firm stand against petitioner; that Sands later accepted appointment by other respondents to serve on the First Hearing Committee, despite the fact that the AAUP guidelines adopted by the Committee expressly provided that such commitee should be composed of faculty members "not previously connected with the case"; that all of the specifications in the Statement of Charges before the Committee consisted of allegations by Sands's friend McMillan; that petitioner attempted to exercise his right to "two challenges without stated cause", as provided by the referenced AAUP guidelines; and that Sands and other members of the Committee denied this right. Pp. 38,39,155, 158 in Record in Appeal No 75-2949, CA5.

By assisting McMillan with the political solicitation and by advising Dean Jones in the matter of bringing discharge proceedings against petitioner, Sands had disqualified himself as an impartial decisionmaker. AAUP Policy Documents and Reports, supra, p.6; Morrissey v. Brewer (1972), 408 U.S. 471, 486; Withrow v. Larkin (1975), 421 U.S. 35, 58. By accepting appointment to serve on the Committee, Sands knowingly deprived petitioner of the opportunity of procuring an impartial decisionmaker on the Committee. If petitioner had not been thus deprived of his constitutional right to an impartial First Hearing Committee, he might have been able to defend his position successfully in that hearing and have avoided all of his subsequent injuries. It is therefore clearly

erroneous for Sands to assert, as he does, that "the complaint seeks damages from respondent solely because of respondent's vote" (p.6; emphasis added).

For the purposes of a motion to dismiss under F.R.C.P. 12(b)(6), "the complaint is construed in the light most favorable to plaintiff and its allegations are taken as true." Wright and Miller, Federal Practice & Procedure § 1357, p. 594, citing Jenkins v. McKeithen (1969), 395 U.S. 411, 421-422; Gardner v. Toilet Goods Assoc. (1967), 387 U.S. 167; Walker Process Equip., Inc. v. Food Mach. & Chem. Corp. (1965), 382 U.S. 172; Radovich v. National Football League (1957), 352 U.S. 445.

Contrary to the referenced holdings, Sands argues that the Court should accept his version of the facts. His assertion that "[a]ll the facts related to responded were before the district court" is obviously erroneous, for there was neither trial, nor answer, nor discovery. Petitioner was not "the beneficiary of [any] recommendation by this respondent" that petitioner receive "one year's severance pay" (p.7). This recommendation, which was made by the Committee and not by Sands, was completely superfluous, for the University's termination policy required such payment: "a faculty member whose appointment is terminated ["for adequate cause"] will be notified of termination at least one academic year in advance of the termination date." See termination policy in Pet. App. at A22. Sands's assertion that the District Court "carefully found that no impropriety can be charged to individual members of the Hearing Committee" (p.8) is proof only of the error of the District Court, which had no discretion to make findings of fact on a motion to dismiss.

CONCLUSION

For the reasons stated here and in the petition, the writ should be granted.

Petitioner respectfully suggests that the issue of the constitutionality of the University's policy on termination of appointment (Pet.App.22) has been fully briefed in the petition, the briefs in opposition, and this reply; that this policy's provision that the appointment of a tenured faculty member may be terminated for undefined and unrestricted "adequate cause" is clearly unconstitutional; that such decision by the Court will foreclose all the other issues except the issue of dismissal as to one defendant; and that this issue also has been fully briefed.

Respectfully submitted,

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Since this brief was printed, petitioner has learned that another University of Alabama discharge case is now pending in the U.S. Court of Appeals for the Fifth Circuit, challenging the constitutionality of the University's policy on termination of appointment. Bert D. Garrett v. David Mathews et al. (CA5 1979), No.79-2597. This is further reason for granting certiorari to decide this issue.

August 17, 1979. Lawrence E. Bowling